

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LUCILLE RUBIN,	:	
Plaintiff,	:	
	:	
-vs-	:	Civ. No. 3:00cv1657 (PCD)
	:	
T. DONALD HIRSCHFELD,	:	
HIRSCHFELD MANAGEMENT, INC.,	:	
and GINETTE S. OWINGS,	:	
Defendants.	:	

RULING ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants move pursuant to FED. R. CIV. P. 12(c) to dismiss the complaint for lack of subject matter jurisdiction due to an absence of complete diversity among the parties. The motion is granted.

I. BACKGROUND

On August 29, 2000, plaintiff filed a five-count complaint alleging breach of contract, breach of a fiduciary duty, fraud and violation of Connecticut Unfair Trade Practices Act ("CUTPA"), CONN. GEN. STAT. § 42-110a *et seq.* Defendants, in their answer, claimed, *inter alia*, lack of subject matter jurisdiction.

Plaintiff alleges as follows. Plaintiff Lucille Rubin is a resident of Florida. Defendant Hirschfeld Management, Inc. ("HMI") is a Connecticut corporation with its principal place of business in Connecticut. Defendant T. Donald Hirschfeld ("Hirschfeld") is a Connecticut resident. Defendant Ginette Owings is a Maryland resident. Plaintiff alleges only 28 U.S.C. § 1332 as a basis for subject matter jurisdiction over the claims.

II. DISCUSSION

Defendants move for judgment on the pleadings arguing that Hirschfeld is a resident of Florida, not Connecticut as alleged, thus complete diversity of citizenship is lacking. Plaintiff responds that the evidence supports her allegation that Hirschfeld is a citizen of Connecticut.¹

A. Standard

A motion to dismiss pursuant to FED. R. CIV. P. 12(c) is reviewed under the same standard as a motion to dismiss for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6). *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001). Thus, allegations in the complaint generally are accepted as true and inferences are drawn in favor of the nonmoving party. *Id.* Such is not the case with allegations of citizenship. *Linardos v. Fortuna*, 157 F.3d 945, 947 (2d Cir. 1998). Diversity jurisdiction is proper only when there is complete diversity among all parties to a suit. *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 930 (2d Cir. 1998). When the citizenship of a party is challenged, the burden is on plaintiff to provide competent proof in support of the alleged basis for jurisdiction, *id.*, and to prove by a preponderance of the evidence that grounds for jurisdiction exist. *See McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 785, 80 L. Ed. 1135 (1936); *Herrick Co. v. SCS Communications, Inc.*, 251 F.3d 315, 322-23 (2d Cir. 2001).

Diversity of citizenship is assessed at the time the complaint is filed. *See Freeport-McMoRan*,

¹ Defendant also argues that plaintiff should be judicially estopped from arguing against Hirschfeld's status as a Florida citizen as she pursued a similar course of action and alleges that she is a Florida citizen whereas he is not. This argument is without merit as "principles of estoppel do not apply to questions of subject matter jurisdiction." *Creaciones Con Idea S.A. De C.V. v. Mashregbank PSC*, 232 F.3d 79, 82 (2d Cir. 2000) (internal quotation marks omitted).

Inc. v. KN Energy, Inc., 498 U.S. 426, 428, 111 S. Ct. 858, 112 L. Ed. 2d 951 (1991). ‘Domicile’ and ‘residence’ are not necessarily synonymous. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989). To establish a domicile, there must be both a physical presence in a place and an intent to remain there. *Id.* Stated differently, a domicile is “the place where a person has his true fixed home and principal establishment, and to which, whenever he is absent, he has the intention of returning.” *Linardos*, 157 F.3d at 948 (internal quotation marks omitted).

B. Analysis

It is not disputed that Hirschfeld has residences both Connecticut and Florida. Resolution of this dispute is therefore limited to determination as to where Hirschfeld intends to remain.

A party’s domicile is determined by evaluation of the totality of the evidence presented. *Hicks v. Brophy*, 839 F. Supp. 948, 950-51 (D. Conn. 1993). Relevant considerations in assessing the totality of the evidence include current residence, voter registration and voting practices, location of personal and real property, location of brokerage and bank accounts, membership in unions, fraternal organizations, churches, clubs, and other associations, place of employment or business, driver’s license and automobile registration and payment of taxes. *Connolly v. Spielman*, 999 F. Supp. 270, 273 (N.D.N.Y. 1998). No single factor is determinative. *Hicks*, 839 F. Supp. at 950-51.

Defendants provide the following in support of their argument that Hirschfeld has a Florida domicile. Hirschfeld states that he moved to Florida in 1990 intending to call Florida his home. Although a self-serving declaration is entitled to some weight, it is not dispositive in the face of evidence to the contrary. *See Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 366 (1st Cir. 2001). Additional

factors propounded in favor of a finding that he is a Florida citizen include his spending 50% of the year in his Florida residence. He is registered to vote in Florida and has voted over the past ten years. He has a Florida driver's license, has two vehicles with Florida registrations, his primary physician and dentist are in Florida, his personal attorney is in Florida and his last will and testament was executed in Florida in 1991 and states that he is a Florida resident. Hirschfeld also has access to bank accounts in Florida, he has his mail sent to Florida, he belongs to the Jewish Federation of South Broward and attends Beth El Temple in Florida and he belongs to the Boys & Girls Club of Broward County.²

Plaintiff provides the following in support of her argument that Hirschfeld has a Connecticut domicile. He grew up in Connecticut and has owned a home in Connecticut for thirty-five years. He has a Connecticut driver's license.³ His place of employment is in Connecticut. He has a real estate broker's license in Connecticut but has no Florida broker's license. Hirschfeld also has a physician and dentist in Connecticut. He continues to support the Hebrew Academy, serving on two boards, and attends religious services when in Connecticut. Hirschfeld was made a life member of the Jewish Community Center in West Hartford, Connecticut.⁴ He has medication sent to his Florida address.

² Defendants argue that a Declaration of Domicile and Citizenship filed on November 9, 1990 establishes defendant's Florida domicile. The document is relevant to determination of citizenship, but, notwithstanding the legal import of such a declaration, does not determine domicile. *See Queally v. Driscoll*, No. 93 C 7829, 1996 WL 67282, at *9 (N.D. Ill. Jan. 12, 1996).

³ Plaintiff alludes to the significance of having both a Florida and Connecticut driver's license, as having the former requires that the applicant surrender all other driver's licenses, unless the applicant is a part-time resident of Florida. *See* FLA. STAT. ch. 322.03(1)(b); FLA. ADMIN. CODE. ANN. 15A-1.005 (2001). As stated in note 2 *infra*, the legal import of having dual licenses does not establish that Hirschfeld has a Connecticut domicile.

⁴ It is not apparent whether plaintiff, by reciting Hirschfeld's longstanding ties to Connecticut, is presenting evidence of his domicile of origin from birth, *see Linardos*, 157 F.3d at 948 ("One acquires a 'domicile of origin' at birth, which continues until a change in domicile occurs."), or is providing evidence as to Hirschfeld's domicile at the time the complaint was filed. There appears to be no evidence of Hirschfeld's place of birth, thus the latter argument is presumed. However,

His credit card statements for both personal and business expenses are sent to a Connecticut address.

Plaintiff characterizes Hirschfeld's ties to Florida as an arrangement for purposes of obtaining favorable tax consequences, not a domicile, citing *Galva Foundry Co. v. Heiden*, 924 F.2d 729, 730 (7th Cir. 1991). *Galva Foundry Co.* is distinguishable from the present case. It involved a change of residency accompanied by a financial transaction, specifically "to shelter the proceeds of the sale of his stock in [the plaintiff company] from Illinois taxes." *Id.* The defendant in that case was born in Illinois and spent the majority of his time in Illinois. All ties to Florida, including a driver's license and voter registration, were acquired within a year of the filing of the complaint. In contrast, Hirschfeld's ties to Florida precede the complaint by a decade, he spends 50% of the year there and his ties to the state are more than the superficial ones presented in *Galva Foundry Co.*

Based on the totality of the evidence, Hirschfeld intends to remain in Florida and thus is found to be a citizen of Florida. Although no single factor is conclusive, *see Hicks*, 839 F. Supp. at 951, his voter registration and active voting, vehicle registrations exclusively in Florida, his division of time between his place of employment in Connecticut and Florida and his ties to the religious community weigh in favor of a finding that he is a citizen of Florida. Hirschfeld's present ties to Connecticut, both familial and business, evince his history with Connecticut but do not establish, by a preponderance of the evidence, *see McNutt*, 298 U.S. at 189, that he intends to remain in Connecticut, *see Linardos*, 157 F.3d at 948. Therefore, as plaintiff and defendant Hirschfeld are citizens of the same state, the parties lack complete diversity of citizenship and there is no basis for subject matter jurisdiction over

assuming arguendo Hirschfeld was born in Connecticut, defendants provide sufficient evidence of a Florida domicile to establish that Hirschfeld changed his domicile from Connecticut to Florida. *See Herrick Co.*, 251 F.3d at 324.

the claims. *See Fednav, Ltd. v. Isoramar, S.A.*, 925 F.2d 599, 602 (2d Cir. 1991). The case is dismissed.

III. CONCLUSION

Defendants' motion for judgment on the pleadings (Doc. 73) is **granted**. Defendants' motion to extend time to complete depositions (Doc. 102) is **denied** as moot. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, March ___, 2002.

Peter C. Dorsey
United States District Court Judge